United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7436

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

CONNECTICUT STATE FEDERATION
OF TEACHERS, ET AL

vs.

BOARD OF EDUCATION MEMBERS, ET AL

Docket No. 75-7436

Appellees' Brief on Appeal
from the District Court for Connecticut

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ISSUE PRESENTED FOR REVIEW

Was the District Court correct in holding that the policies of the school boards and the provisions of the collective bargaining agreements in question do not unconstitutionally abridge the plaintiffs' rights?

I

NARROWING THE ISSUES

At the outset, we wish to emphasize precisely what is, and is not, at stake in this litigation. This case does not present the question whether teacher organizations vying for selection as exclusive bargaining representative have a Constitutional right to use school facilities during the campaign, for Connecticut statutes provide such access during election campaigns. Nor does this case present the question whether the organization which is elected as exclusive bargaining representative has a Constitutional right to use school facilities for carrying out its representative functions, for such access has been voluntarily accorded in the collective bargaining agreements in issue herein.

The narrow issue posed on this appeal thus is whether a defeated teacher organization has a Constitutional right to use school facilities at all times during the year for the purpose of communicating its views on matters which have been entrusted, by the vote of the teachers, to

another bargaining representative; all in the interest of organizing, recruiting new members and attempting to become the bargaining agent. As we show herein, neither the First Amendment nor the equal protection clause of the Fourteenth Amendment entitles the Federation to such access.

II

THE "MAJORITY RULE" PRINCIPLE, AND THE CONCOMITANT ACCORDATION OF ACCESS TO THE EMPLOYER'S FACILITIES ONLY TO THE EXCLUSIVE BARGAINING REPRESENTATIVE, ARE KEYSTONES OF AMERICAN LABOR POLICY AND CONTRAVENE NO CONSTITUTIONAL COMMAND.

The key to this case is an understanding of the "majority rule" principle which underlies virtually all American labor legislation. That principle is to accord to the organization selected by a majority of the employees in a unit the power and duty to function as the exclusive representative of all employees in the unit. It is the keystone of federal laws regulating labor relations in private industry,1/

1/ Railway Labor Act, Section 2, Fourth, 45 U.S.C. §152, Fourth; National Labor Relations Act, Section 9(a), 29 U.S.C. §159(a).

of Executive Order 11491 governing labor relations in the federal government itself, §7, 3 C. F. R. 191 (1969 Comp.), as amended, Executive Order 11616, 3 C.F.R. 202 (1971 Comp.), and of the Connecticut Teacher Negotiation Act, Connecticut General Statutes, Section 10-153b, et seq.

As stated in the report by the New York "Governor's Committee on Public Employee Relations, Final Report", dated March 31, 1966, Page 29:

> "There are advantages in the elimination of the possibility that the executives of an agency will play one group of employees, or one employee organization off against another. There are advantages in the elimination, for a period, of inter-organization rivalries. There are advantages in discouraging the 'splitting off' of functional groups in the employee organization in order to 'go it on their own.' There are advantages in simplifying and systemizing the administration of employee and personnel relations. There are advantages in an organization's ability to serve all of the employees in the unit."

The Advisory Commission on Intergovernmental Relations is a Federal Commission established by Congress in 1959. In its report entitled "Labor-Management Policies for State and Local

Government", dated September, 1969, part of Recommendation No. 9 of the Commission contained in the report at Page 106 is as follows:

> "The Commission believes that State public labor-management statutes should require public employers to accord by formal recognition full meet and confer rights to the organization representing a majority of the employees in an appropriate unit. The Commission believes that this preferred treatment accorded the majority representative should condition the approach to minority groups, and that extension of informal recognition privileges to such organizations should not be required by State publi labor-management relation laws.
>
> Legislators have basically two options regarding minority groups which are compatible with this position. Management could be statutorily barred from extending any informal recognition privileges to such organizations and this would have the effect of giving exclusive recognition rights to the majority organization . . ."

The Connecticut Legislature has chosen to deal with this matter in the manner exemplified by the Advisory Commission's recommendation. Thus, from a fair reading of the Teacher Negotiation Act, Connecticut General Statutes, Section 10-153b. et seq., it is only during an election process, or in the absence of a recognized exclusive representative, that non-exclusive treatment for all employee

organizations is required.

Section 10-153d of the General Statutes states that ". . . in the absence of any recognition of certification as the exclusive representative as provided by Section 10-153b, all organizations seeking to represent members of the teaching profession shall be accorded equal treatment with respect to access to teachers, principals, members of the Board of Education, records, mail boxes, and school facilities, and participation in discussion with respect to salaries and other conditions of employment." (Emphasis added).

Section 10-153c provides that: "Each organization shall have, during the election process, equal access to school mail boxes and facilities." (Emphasis added).

Section 10-153b(f) states: "Any organization which has been designated or elected the exclusive representative of a unit which includes teachers and administrators shall continue to be the exclusive representative of such personnel upon expiration of the salary

agreement in effect between such organization and the board of education employing such personnel on the effective date of this act until or unless employees of such board of education in either units defined in this section initiate a petition for designation or election of an organization to represent them in accordance with the procedures set forth in this act." (Emphasis added).

There is no allegation that there is an election at this time in the school systems involved, and it is admitted that the defendant Associations are the recognized exclusive representative for all teachers in each school system.

New Haven Federation of Teachers v. New Haven Board of Education, 27 Conn. Sup. 298 (1967), was a declaratory judgment action brought by the New Haven Federation of Teachers against the New Haven Board of Education and the New Haven Teachers League to construe the then newly enacted Teacher Negotiation Act. The claim of the plaintiff was that the defendant, New Haven

Teachers League, which had won the election to represent New Haven school teachers should not be recognized by the New Haven Board of Education. The Court upheld the election and the designation of the New Haven Teachers League. One of the other claims made by the plaintiff had to do with the question of whether all teacher organizations are entitled to equal rights under the Teacher Negotiation Act. As to this point the Court held as follows at page 315:

> The plaintiffs claim that unless there has been a referendum under Public Act 298 no organization has the right to represent the teachers to the exclusion of any other organization, but rather all teacher organizations are entitled to equal rights to negotiate with the board of education. Section 3 of Public Act 298 (General Statutes Section 10-153d) does not so provide, but does state that only in the absence of any certification as the exclusive representative as provided by Section 1 (Section 10-153b) shall all organizations seeking to represent members of the teaching profession be accorded equal treatment with respect to access to teachers, principals, members of the board of education, records, and participation in discussion with respect to salaries and other conditions of employment. Here there had been a certification of the league as exclusive representative, which precludes the right of any other organization to have the equal treatment accorded by Public Act

298 in the event of noncertification."

The "majority rule" principle unquestionably interferes with the interests of that minority of employees who would prefer not to be represented by the elected organization. Absent the statutory grant of exclusivity, these minority employees would be free to bargain for themselves, or through an organization of their choice. Thus all labor legislation adopting the majority rule principle, including that governing private industry, constitutes "government action" which deprives individuals of rights they would otherwise enjoy. As the Supreme Court explained in Steele v. L.&N.R. Co., 323 U.S. 192, 200, 202 (1944), with respect to the Railway Labor Act:

> "The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining.
>
> * * * * *
>
> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative

body both to create and restrict the rights of those whom it represents." (Emphasis added).

Not surprisingly, such legislative deprivations of the rights of the minority, when first enacted, were challenged as unconstitutional. But the Supreme Court upheld the constitutionality of both the Railway Labor Act and the National Labor Relations Act. Virginia Ry. v. System Federation, 300 U.S. 515 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). 2/

The Court recognized that the majority rule principle serves two important interests. First, by assuring that employees will bargain in concert, and not in competition with one another, it helps equalize the bargaining power

2/ As explained by a three-judge court in National Maritime Union v. Herzog, 78 F. Supp. 148, 154 (D.D.C. 1948), affirmed 334 U.S. 854:

"Each time a union, chosen by a bare majority vote in a bargaining unit, is certified as the exclusive bargaining agent for that unit, the employees who did not vote with the majority are denied representation by a collective bargaining agent of their choice. It has never been held that the Wagner Act is therefore invalid."

See also Weyand, Majority Rule in Collective Bargaining, 45 Colum. L. Rev. 556 (1945).

of employers and employees - one of the principal purposes of the NLRA. 3/ As Senator Wagner had explained:

> "/C/ollective bargaining can be really effective only when workers are sufficiently solidified in their interests to make one agreement covering all. This is possible only by means of majority rule." 4/

See also J. I. Case Co. v. Labor Board, 321 U.S. 332 (1944). Second, majority rule provides order and stability, and thus reduces labor strife - another of the NLRA's objectives. These values were deemed sufficiently important to justify the undeniable intrusion upon individual rights resulting from majority rule. 5/

3/ See NLRA Section 1, 29 U.S.C. §151.
4/ Hearings before Committee on Education and Labor on S. 1958, 74th Cong. 1st Session (1935) Pt. 1, p. 43.
5/ The Court did not, however, ignore the rights of minority employees. While refusing to invalidate majority rule, the Court concluded that the extraordinary statutory grant of exclusivity to the bargaining representative carried with it the "corresponding duty . . . to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." Steele, supra, 323 U.S. 202-203. See also Syres v. Oil Workers International Union, 350 U.S. 892 (1955); Ford Motor Company v. Huffman, 345 U.S. 330 (1952); Humphrey v. Moore, 375 U.S. 335 (1964); Vaca v. Sipes, 386 U.S. 171 (1967).

Appellants in the instant case do not purport to challenge the Constitutionality of the majority rule principle. But they do challenge a consequence which almost inevitably accompanies the grant of exclusivity -- the elected bargaining agent's exclusive right to the use of the employer's premises for the performance of its collective bargaining functions, and the denial of such access to defeated rivals who wish to criticize the bargaining agent's performance, recruit members for itself and displace the elected bargaining agreement. As we now show, the considerations which validated majority rule apply equally to exclusive access, and the resulting loss of minority employees' "rights" are therefore not of Constitutional dimension.

The relationship between majority rule and the exclusion of minority voices was early recognized in NLRB v. Draper Corp., 145 F. 2d 199, 203 (4th Cir. 1944). As Judge Parker there explained:

"A union selected as bargaining agent is

> . . . made the exclusive representative of all the employees for the purpose of collective bargaining. As said in Virginian R. Co. v. System Federation, 300 U.S. 515, 548, 'the law imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other' . . . The employees must act through the voice of the majority or the bargaining agent chosen by the majority. Minority groups must acquiesce in the action of the majority and the bargaining agent they have chosen; and, just as a minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining which is being carried on by the duly authorized bargaining agent chosen by the majority." (Emphasis added).

An employer would hardly be faithful to his "negative duty to treat with no other" if he made his facilities available to rival organizations who wish to criticize the bargaining agent's performance, to exhort the employees to prefer goals different from those being sought in negotiations by the bargaining agent, to recruit members from among those belonging to the bargaining representative, and in general attempt to displace that representative at all times, commencing with the time of election and continuing until the next election. Indeed,

to allow such discordant voices within the employer's premises would undo all that majority rule was designed to accomplish. Competition and dissension among employees would be renewed, employee bargaining power would consequently be diluted, and the danger of strife would be greatly increased.

Because of these considerations, the NLRA has been uniformly construed to permit access to the employer's premises for the incumbent union while denying such access to its rivals. As the NLRB explained in Seaboard Terminal Co., 114 NLRB 754, 755 (1955):

> "/T/he ILA, by virtue of its status as representative of the employees involved, had a right of access to all of the Respondent's piers in order to administer its contract, while the Petitioner had no such right. It is well established that . . . an employer may not infringe upon the rights of an incumbent union to administer its contract. Thus, such disparity of treatment with respect to right of access, in itself, clearly involves no violation of the Act but rather derives from the incumbent status of one of the competing unions." (Emphasis added).

Consistent with this principle, the Board has held that it is permissible to allow the

incumbent union to hold meetings on the employer's premises while denying rival unions that right, 6/ to allow the incumbent union to use bulletin boards while denying their use to rival unions, 7/ and to permit the incumbent union to solicit union membership on employer premises while denying that right to its rivals. 8/

The access rules enunciated under the NLRA have also been applied when the federal government is the employer. The Federal Civil Service Commission, in regulations adopted to implement the Executive Order governing federal employee labor relations, provides as follows:

> "Once exclusive recognition has been granted in a given unit and until a valid, timely challenge has been presented and rules governing campaigning are established, no assistance should be given by the agency to any other employee organization . . . for the purpose of aiding it to solicit member-

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6/ General Counsel Ruling, Case No. K-578, 37 LRRM 1252 (1956). See also Coamo Knitting Mills, Inc., 150 NLRB 579, 582 (1964); Hotpoint Co. v. NLRB, 289 F.2d 683, 688-689 (7th Cir. 1961).
7/ Armco Steel Corp., 149 NLRB 1179, 1186 (1964), reversed on the other issues (this issue was not appealed) 344 F. 2d 621 (6th Cir. 1965).
8/ General Counsel Ruling, Case No. K-299, 37 LRRM 1456 (1956).

ship or authorization cards. This means the agency should not grant the use of meeting rooms during non-work hours, permission to distribute literature, or permission to non-employees to solicit membership on agency premises. An agency should not allow the use of bulletin boards to any employee organization other than the exclusive representative, but may authorize an organization with informal recognition to post a notice of a meeting of its members to be held off agency premises." 9/

Of course minority employees retain their First Amendment rights to belong to a rival organization and to communicate with each other and with other employees about collective bargaining matters, and certainly the Federation locals herein have other means by which they can communicate with all the teachers in the school systems involved. But as the above experience indicates, those rights do not extend to using the employer's facilities for that purpose. Just as a defeated candidate for Congress retains his First Amendment right to criticize the victor's performance, but does not receive the "franking" privilege to communicate that criticism, so a defeated employee association

9/ Federal personnel Manual Letter No. 711-6, December 14, 1966.

retains the right to criticize the victor but is not entitled to access to employer premises to communicate that criticism.

If appellants' Constitutional claims were valid, they would invalidate not only the Civil Service Commission's regulations governing federal employees and the Connecticut Teacher Negotiation Act, but the whole NLRA experience as well, for as we have shown the NLRA treatment is based upon a Congressional investiture of "exclusivity" and thus constitutes "government action" subject to the First and Fourteenth Amendments.

III

THE COLLECTIVE BARGAINING PROVISIONS IN QUESTION DO NOT UNCONSTITUTIONALLY ABRIDGE THE PLAINTIFFS' RIGHTS.

In the leading case in point, a Federal District Court in Colorado has had occasion to rule upon the question of whether the grant of exclusive privileges to a majority organization violated any Federal Constitutional rights. The Court in Local 858 of AFT v. School District No. 1 in County of Denver, 134 F. Supp. 1069

(D.C. Colo., 1970) ruled as follows:

"We do not accept plaintiffs' contention, belatedly clarified at argument, that the issue here is a broad restriction on free speech. We acknowledge that the public schools are a public institution which present special opportunities for the exercise of the First Amendment right of free speech. However, this case does not present that issue. The parties are so situated and the controversy arose under such circumstances that plaintiffs seek to utilize certain facilities that are clearly distinct from pure speech rights. This case presents a problem of labor relations, and although the problem is in the context of public employment, this does not alter its essential character. Plaintiffs are a labor union and its officials and members, and they are seeking to utilize only those internal channels of school communication which are not traditionally of public nature for the purpose of furthering the goals of their union. The privilege of dues check off which they claim is peculiarly a matter of labor relations. Thus, we do not accept plaintiffs' characterization of the issue as one of alleged impairment of broad First Amendment rights. Rather, the case presents the precise issue of whether or not the granting of the four enumerated exclusive privileges to the DCTA impairs the right to organize and form unions of Denver teachers who are not members of the DCTA." 314 F. Supp. at pp. 1074-1075.

The grant of exclusive privileges to one of two competing unions after that union has won a representation election serves several interests. It allows the effective exercise of the right to form and join unions in the context of public employment. It provides the duly elected representative ready means of communicating with all

teachers, not just the DCTA membership. This is essential since the DCTA represents all teachers, not just its membership. It eliminates inter-union competition for membership within the public schools except at time of representation elections. This has several salutary aspects. Orderly functioning of the schools as education institutions is insured through the limiting of the time span when they may become a labor battlefield. The representative union is not subjected to competition within the schools, and thus is better able to function as a representative, its efforts not spent in constant competition with the union that lost the representation election. The fact that the representative's strength is not bled away by such constant high intensity inter-union conflict allows the public employees better representation, providing a more beneficial exercise of the right of association. Finally, all of these benefits resulting from the grant of exclusive privileges to the elected representative serve the principal policy of insuring labor peace in public schools. Labor peace means a continuity of ordered collective bargaining between school officials and representatives of the teachers. It means a lowered incidence of labor conflict and strife, thus insuring less interference with the functioning of the public schools as educational institutions . . . We find that the plaintiffs have not proved significant interference with their freedom of association, and we find that the defendant has proved that substantial state interests are served by the grant of exclusive privileges to the intervener . . . We agree with the New York Court of Appeals decision Bauch v. City of New York, 21 N.Y. 2d 599, 289 N.Y.S. 2d 951, 237 N.E. 2d 211 (1968), cert. den. 393 U.S. 834, 89 S. Ct. 108, 21 L. Ed. 2d 105, that neither the First Amendment nor any other constitutional provision entitles a public employees' union

which has lost a representation election to the special aid of a public employer's collection and disbursing facilities . . . We are satisfied that the grant of exclusive privileges to the duly elected bargaining representative of public school teachers by the School District promotes a compelling government interest. The interests of the above outlined in our discussion of the First Amendment claim are compelling, for labor peace and stability in an area as vital as public education are indisputably a necessity to the attainment of that goal. Inter-union strife within the schools must be minimized. Unnecessary work stoppages and the consequent impairment of the educational process cannot be tolerated without significant injury to public education. 314 F. Supp. at 1076-7.

Another case directly in point is Bauch v. City of New York, 21 N.Y. 2d 599, 289 N.Y.S. 2d. 951, 237 N.E. 2d 211 (1968), cert. den. 393 U.S. 844, 21 L. Ed. 2d 105, 89 S. Ct. 108.

This action was concerned with a claim by the plaintiff, a minority union, that the denial of dues checkoff rights by the City violated constitutional rights of the plaintiff. The considerations involved in that case, therefore, were very similar to the considerations involved in this matter. The New York Court first stated that:

"The City program is in accord with national labor policy which has been built on the

premise that a majority organization is the most effective vehicle for improving wages, hours and working conditions." 237 N.E. 2d at 214.

The Court then concluded that:

"Nothing in the City's labor policy denies members of the petitioners' union the right to meet, to speak, to publish to proselytize, and to collect dues by the means employed by thousands of organizations of all kinds that do not have the benefit of a dues checkoff. Neither the First Amendment, nor any other constitutional provision entitles them to the special aid of the City's collection and disbursing facilities. 237 N.E. 2d at 215.

A third case directly in point is Federation of Delaware Teachers v. De Lawarr Board of Education, 335 F. Supp. 385 (D. Del. 1971). There, too, the collective bargaining agreement granted similar exclusive rights to the exclusive bargaining representative, the De Lawarr Education Association. The state statute there in question was similar to the Connecticut statute in stating that ". . . in absence of any certification as the exclusive bargaining representative, all organizations seeking to represent public school employees shall be accorded equal treatment with respect to access to such employees." Delaware Code, Title 14,

Section 4009, quoted id. at p. 387. Citing with approval the case of Local 858 of AFT v. School District No. 1 in County of Denver, supra, the court held that:

> ". . . the exclusive privileges granted to the Association . . . are constitutionally permissible. The denial of similar rights to the FDT serves to promote a compelling state interest, the desire to keep school buildings and grounds from becoming 'labor battlefields.'" Id. at 389.

The Supreme Court of Nevada has also had occasion to rule on this question in Clark County Classroom Teachers Association v. Clark County School District and Las Vegas Federation of Teachers et al, 532 P. 2d 1032 (Nev. Sup. Ct. 1975). The Nevada Court, reversing the trial court, ordered an injunction be granted to prevent the minority Federation's use of "school bulletin boards, mail delivery service, teacher's mail boxes, meeting rooms, and payroll deduction of union dues."

And as the Supreme Court of New Jersey has stated in Lullo v. Fire Fighters, Local 1066, 55 N.J. 404, 262 A.2d 681, 690-691 (1970):

Experience in the private employment sector

has established that investment of the bargaining representative of the majority with the exclusive right to represent all the employees in the unit is a sound and salutary prerequisite to effective bargaining. Beyond doubt such exclusivity - the majority rule concept - is now at the core of our national labor policy. N.L.R.B. v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 180, 65 LRRM 2449. Application of the majority rule concept strengthens the right of the individual employee to obtain fair and equitable terms of employment. It brings the collective strength of all the employees in the unit to the negotiating table and thus enhances the chances of effectuating their community purposes and serving the welfare of the group. The employee who votes against the representative chosen by the majority or who exercises his privilege not to join the organization of the representative suffers no constitutional infringement of his basic freedom of contract right because of the exclusivity principle . . . Thus although application of the democratic doctrine of majority rule in the area of employer-employee relations requires a dissident individual or minority group of employees to bow to the will of the majority, the wholesome purpose is to supersede the possible terms of individual agreements of employers with terms which reflect the strength and bargaining power and serve the welfare of the group. The terms and advantages of the collective agreement become open to every employee in the represented unit. It has been said that advantages to an employee through an individual contract 'may prove as disruptive of industrial peace as disadvantages'.

See also, Civil Service Forum v. New York City Transit Authority, 4 App. Div. 2d 117, 163 NYS 2d 476 (1957).

With regard to the plaintiffs' Equal Protection claim, it is submitted that the above-cited cases clearly refute the existence of any violation. It is further submitted that the applicable standard is the permissive standard which allows any classification which is not "purely arbitrary" or "wholly irrelevant to the achievement of the state's objective." E. G., Morey v. Dowd, 354 U.S. 457, 1 L. Ed. 2d 1485, 77 S. Ct. 1344 (1957). There is no "fundamental right" to dues deduction, the use of mail boxes, bulletin boards or the like. Indeed, the above-cited cases make clear that these are privileges which may be bestowed upon the exclusive bargaining agent alone.

Thus, the Appellants' equal protection argument founders on the self-evident proposition that there is a "rational" basis for distinguishing the exclusive bargaining agent from its defeated rival. "/S/uch disparity of treatment with respect to right of access . . . derives from the incumbent status of one of the competing unions." Seaboard Terminal Co., 114

NLRB 754, 755 (1955). Connecticut provides equal access when organizations stand on an equal footing, i.e. when they are engaged in a contest for selection as bargaining representative. But once the election campaign is over, the two organizations no longer have equal claims to access. The winner is entitled to represent the teachers; the loser is not. There is nothing "unequal" in allowing access for representation purposes to the only organization entitled to perform representative functions.

Whichever standard is utilized, however, there is no question of violation of Equal Protection. As stated by the court in Local 858 AFT v. School District No. 1 in the County of Denver, supra:

> "Thus, we find that the grant of special privileges attacked here satisfies the strictest test for constitutional equal protection. We make this finding although we are not convinced that in fact the classification challenged impairs the exercise of a constitutional right. Therefore, plaintiffs have not proved that the action of the defendant and intervener denies them equal protection of the laws in violation of the Fourteenth Amendment." pp. 1077-1078.

In finding a "compelling governmental interest,"

the Court in Local 858 noted that exclusive representation: (1) allows all employees to exercise the right to form and join employee organizations in the context of public employment; (2) provides the duly elected representative a ready means of communicating with all employees, not just its membership, thus assuring a viable, effective employee organization; (3) eliminates active inter-organizational competition for membership within the public service except during the brief periods of representation elections; and, in general, (4) ensures labor peace in the public sector, enabling government bodies to effectively execute their assigned duties. 314 F. Supp at 1076.

Finally, the Federation's asserted "right" to have its membership dues deducted from teachers' salaries is simply nonexistent. Even the exclusive bargaining agent does not have such a "right". Check-off is a benefit which must be won through collective bargaining, else it does not exist at all. H. K. Porter Co. v. Labor

Board, 397 U.S. 99 (1970). Nor, again, is there any denial of equal protection in the School Board's granting the checkoff to the exclusive bargaining agent while refusing it to a defeated rival. The dues of the exclusive bargaining agent are used to provide the representational services for which it was elected, while those of the defeated rival are not. Accordingly, it is wholly rational that a School Board would differentiate between the two. Accord: Bauch v. City of New York, supra. Moreover, it has been held that the granting of dues checkoff provisions to a minority union is a violation of the employer's obligation under the Railway Labor Act to bargain only with the exclusive representative of the employees. Switchmen's Union v. Southern Pacific Company, 253 F. 2d 81 (9th Cir. 1958), cert. den. 358 U.S. 818, pet. for reh. den. 358 U.S. 896. The plaintiffs apparently also raise the question of the propriety of "lock-in" provision. It is clear that the "lock-in" clauses are valid.

An analysis of the dues deduction pattern

demonstrates that there is no constitutional barrier to a "lock-in" clause. The teacher electing the dues deduction method of payment receives full benefits of membership immediately, but pays on what is essentially an "installment plan"; that is, the portion of the yearly dues is deducted from each paycheck. The plaintiffs' claim on page 23 of its brief regarding the impediment to dropping out of the Association is the equivalent of requiring that a teacher who pays his dues in full is entitled to a rebate if he wishes to drop out - a clearly absurd proposition.

The cases which have dealt with "lock-in" provisions have all reached the conclusion that these clauses are valid.

In Brooks v. Continental Can Corp., 59 LRRM 2779 (D.C. S. N. Y. 1965), a federal District Court upheld the validity of an automatic renewal clause noting "an employee's purported revocation which was tendered at a time other than that specified in the contract was ineffective."

This same line of reasoning was followed in SeaPAK v. Maritime Union, 300 F. Supp. 1197 (D.C. GA. 1969); and Operative Potters v. Tell City China Co., 295 F. Supp. 961 (S.D. Ind. 1968).

It must be stressed that all of the clauses involved herein require a voluntary, affirmative agreement on the part of the teacher before dues are deducted. Once having made that voluntary election, the deduction may continue for one year, or may be automatically renewed; but the matter is governed by the voluntary agreement by the teacher. This crucial point distinguishes Groton Federation v. Groton Education Association (#042750, New London Sup. Ct., July 1, 1975) cited by the plaintiffs, since that case turned upon the fact that the clause provided for automatic deduction if no affirmative action was taken by the teacher to prevent the deduction. In addition, Groton did not purport to decide Constitutional claims.

The Appellants have also cited the case of Board of School Directors v. Wisconsin Employment Relations, 42 Wis. 2d 637, 168 N.W. 2d 92

(1969) in support of their argument. This case is not appropriate as precedent in Connecticut since the basic Wisconsin law differs in significant respects from the law in Connecticut. Connecticut law, as pointed out above, requires equal treatment only when there is an election or when there is no recognized bargaining agent. Wisconsin law provides for equal treatment even when there is minority representative. Id. at p. 94, ftnt. 3. In addition the Wisconsin statute does not even specifically authorize an exclusive representative and, most importantly, Wisconsin school boards are not under any duty to bargain with teachers. See Lacrosse County Institution Employers Local 227 v. Wisconsin Employment Relations Commission, 52 Wisc. 2d 295, 190 N.W. 2d 204, 207 (1971). Thus the Wisconsin law is so far removed from what exists in Connecticut as to be of no aid whatsoever in analyzing the problems in the case at bar.

IV

THE CASES CITED BY THE PLAINTIFFS' IN SUPPORT OF THEIR POSITION ARE NOT PERSUASIVE

The Plaintiffs apparently rely heavily on Tinker v. DesMoines Independent Community School District, 393 U.S. 503 (1969) and James v. Board of Education, 461 F. 2d 566 (2d Cir. 1972), cert. den. 409 U.S. 1042 (1972). These cases are clearly inapplicable in that they involve a pure free speech issue.

But these cases add nothing to the plaintiffs' position herein. The fact that a teacher may express his views on a war by wearing an arm-band, or a policeman may wear his hear long in a symbolic act of free speech, does not support the proposition that a minority union is entitled to access to the employer's mailboxes, bulletin boards or dues deduction mechanisms.

The plaintiffs also cite the case of Healy v. James, 408 U.S. 169 (1972), a case which dealt with the recognition of a student association by a college administration. It is highly

significant that this case deals with the right of students attending the college to associate in what may be an unpopular group, and as such is distinguishable from the case at bar. James turns on the right of a college to pick and choose which groups it will recognize on the basis of their popular or unpopular beliefs, and in no way bears upon the rights to be accorded to a minority union composed of teacher employees of a board of education. As demonstrated in Parts II and III of this brief, substantial considerations exist which justify differentiation in the treatment of a minority union from the treatment of the college club.

The case of Los Angeles Teachers Union v. Los Angeles City Board of Education, 76 Cal. Rptr. 723, 455 P. 2d 827 (1969) dealt with circulation of a petition during teachers' free time, and did not involve any question of a minority union. Similarly, Friedman v. Union Free School District, 314 F. Supp. 223, (E.D.N. Y. 1970) involved distribution of notices through school mail boxes by the exclusive bar-

gaining agent, and did not involve a minority union. In addition, the regulation there in question effectively prevented communication by the Representative to the teachers which it represented. As stated by the Court:

> "This policy regarding the use of mailboxes is important when considering the reasonableness of the regulation in question. But it must be borne in mind that the 11F-21 prohibition reaches far beyond the faculty mailboxes and 'The Voice.' It prohibits the distribution of all literature by teachers in all areas of the school premises at all times (with the limited exception of 'routine internal distributions'). Id. at 226.

The Federation locals involved herein are minority unions. These unions are not being denied the opportunity to communicate with teachers, but rather are being denied the same privileges granted to the bargaining agent. The case of Norwalk Federation of Teachers v. Norwalk Teachers Association (Fairfield Sup. Ct. No. 147556, 1973) was "decided on its own facts, and lack of other facts. As a case, it is unique from every standpoint." That case, insofar as it turns on a purported statutory violation, is inapplicable to this claim of

unconstitutionality; and insofar as it may turn on a finding of a finding of a violation of constitutional rights, it is both distinguishable and in error.

CONCLUSION

"The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Adderley v. Florida, 385 U.S. 39, (1966). See also Brown v. Louisiana, 383 U.S. 131 (1966). 10/ The local boards of education have decided that school facilities should be made available to the teachers' exclusive bargaining representative, in order that it may more effectively perform the functions for which it was elected. The Boards did not thereby become obligated to provide like access to a rival organization to carp and criticize the bargaining representative's performance, and as we have shown the entire fabric of American

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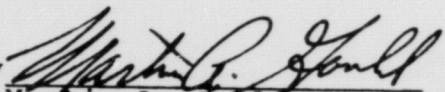
10/ (In Brown a majority of the Court, Justices White, Black, Clark, Harlan and Stewart, wrote or joined opinions so declaring. They differed only as to the scope of intended use to which the public library there involved had been dedicated.)

labor policy dictates against permitting such use of the public schools.

Appellees therefore request that this Court affirm the judgment of the District Court. 11/

Respectfully submitted,
Appellants

By 
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11/ The Appellants have requested in their brief that in the event that this Court should not affirm said judgment, the remedy should be entry of summary judgment for the Appellants. It is submitted that the proper remedy in the event that this Court should not affirm the judgment of the District Court is a remand of this matter for the taking of evidence and a decision regarding the issue of the "clean hands" defense, not decided by the District Court in view of its entry of summary judgment for the Appellees. In addition, the District Court would have to take evidence regarding the issue of the factual justification for the exclusivity provisions here in question.

PROOF OF SERVICE

This is to certify that I have served the foregoing brief by putting two copies in properly addressed envelopes and mailing the same, postage prepaid, on this 7th day of November, 1975 to the following:

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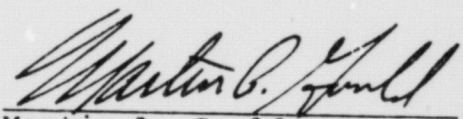

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